95-1274

Supreme Court, U.S.
FILED
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CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CATALINA ENTERPRISES, INC. PENSION TRUST
Petitioner,

v.

THE HARTFORD FIRE INSURANCE COMPANY
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

I. Whether the conscious disregard of the Fourth Circuit Court of Appeals to address and decide issues presented and extensively briefed on appeal constitutes a denial of Petitioner's Due Process rights as guaranteed by the United States Constitution.

II. Whether the failure of the Fourth Circuit Court of Appeals to enforce the Federal Rules of Civil Procedure with regard to the discovery obligations of the Respondent constitutes a denial of Due Process to the Petitioner as guaranteed by the United States Constitution.

PARTIES TO THE PROCEEDINGS

There are no additional parties involved in this proceeding other than those listed in the caption of this matter.

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IN THE SUPREME COURT OF THE UNITED STATES

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CATALINA ENTERPRISES, INC. PENSION TRUST,
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v.

THE HARTFORD FIRE INSURANCE COMPANY,
Respondent

and

JENNINGS INSURANCE ASSOCIATES, INC.,
Defendant

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Catalina Enterprises, Incorporated Pension Trust, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on October 17, 1995.

OPINIONS BELOW

The Order denying Petitioner's Petition for Rehearing In Banc was not reported and is reproduced in the Appendix at p. 1a. The opinion and judgment of the Fourth Circuit Court of Appeals, dated October 17, 1995, was reported. A copy of the opinion is reproduced in the Appendix at p. 3a. The Order of the Fourth Circuit Court of Appeals denying Petitioner's Motion for Leave to File for Relief in U.S. District Court from Judgment Entered Herein Pursuant to Rule 60(b) was not published and is reproduced in the Appendix at p. 12a. The order of the United States District Court for the District of Maryland, dated October 11, 1994, which granted summary judgment in favor of Respondent, was not published. A copy of that order and the accompanying memorandum, also dated October 11, 1994, are reproduced in the Appendix at p. 15a.

JURISDICTIONAL STATEMENT

On October 17, 1995, the Fourth Circuit Court of Appeals entered judgment and opinion affirming the action of the United States District Court for the District of Maryland which granted summary judgment to Respondent herein.

The jurisdiction of the Court to review the judgment of the Fourth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fifth Amendment, Constitution of the United States.

Rules 33 and 34, Federal Rules of Civil Procedure

STATEMENT OF CASE

The Petitioner, Catalina Enterprises, Inc. Pension Trust, is a trust established for the benefit of fifteen employees of a small Baltimore, Maryland based business. The Trust is managed and represented by its Trustee, Richard Shofer. One asset of the Trust is a warehouse which had been leased to commercial tenants.

The "Due Process of Law" as guaranteed to every citizen by the United States Constitution is the only issue in this case. Petitioner's right to Due Process, and therefore its civil rights, have been violated by the failure of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") to adjudicate issues properly preserved and presented on appeal. In actuality, Petitioner is fifteen employees whose retirement income has been jeopardized by the Fourth Circuit's failure to adjudicate issues before it and to enforce the Federal Rules of Civil Procedure.

The warehouse property, referred to above, was badly damaged by a fire which occurred on or about May 10, 1992. When Petitioner originally acquired this property several years before the fire, it was insured by virtue of a "Multi-Flex" policy. This policy was renewed on an annual basis. Prior to the fire, the "Multi-Flex" policy was replaced by a policy known as a "SPECTRUM" policy. The "Multi-Flex" and the "SPECTRUM" policies contained significant differences, and those differences were unknown to Petitioner. The "SPECTRUM" policy was in effect for the period of November 29, 1991 to November 29, 1992.

At the time of the fire, there was no tenant occupying the premises, and this situation had existed for at least 60 days prior to the fire. However, at the time of the fire, Petitioner had meaningful personal property in the warehouse.

An examination of the "SPECTRUM" policy revealed certain exclusions as to coverage. Pertinent to an important issue in this case was language dealing with the subject of "vacancy". Relevant language in the "SPECTRUM" policy was as follows:

> This Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant beyond a period of 60 consecutive days. 'vacant' or 'vacancy' means containing no contents pertaining to occupation of the building, but a building in process of construction shall not be deemed vacant.
>
> The policy also provided as follows:
>
> Permission is granted for a described building to be unoccupied.

The policy was issued by Respondent, and Respondent accepted premiums from Petitioner.

Early on May 11, 1992, the day following the fire, Trustee Shofer caused notice of the fire to be sent to Defendant, Jennings Insurance Associates, Inc. (hereinafter referred to as "Jennings"), a broker which acted for the Respondent.

On May 12, 1992, Respondent assigned an independent investigator, a C. Dwight Moose of Leizure Associates, to conduct an investigation into the circumstances surrounding the loss. Mr. Moose quickly confirmed the absence of a tenant on the premises at the time of the fire, and Trustee Shofer provided a history of tenant occupancy on

May 14, 1992 in response to a request for such information by Respondent.

Notwithstanding receipt of the tenant history, and the results of Mr. Moose's initial investigation, Respondent advised Trustee Shofer that it wished to conduct a further investigation into the cause or causes of the fire. In order to be able to do this, Respondent requested that Trustee Shofer sign a "Non-Waiver Agreement." The "Non-Waiver Agreement" was on a standard form, and it made no reference to any specific defenses or exclusions of coverage contained in the policy. Maryland law requires that such defenses be specifically set forth in the non-waiver agreement". The further investigation included the corporate, business and personal financial records of Petitioner and its Trustee. Respondent eventually concluded that there was no connection between Trustee Shofer and the fire. Months went on before Respondent took any action regarding the loss. Finally, on September 2, 1992, Respondent informed Petitioner by letter that it was denying coverage because the subject property had been vacant for more than sixty days. This information had been known to Respondent within 72 hours of the loss and required no investigation to ascertain. Respondent intentionally withheld from Trustee Shofer its decision to deny coverage on the basis of vacancy.

After its attempts to obtain coverage from Respondent were unsuccessful, Petitioner filed suit in the Circuit Court for Baltimore City in March of 1993. Respondent filed an Answer To the Complaint on April 15, 1993. At the same time it filed its Answer, Respondent also filed a Notice of Removal, citing diversity as the basis for the action, since Respondent's principal office was outside the State of Maryland.

Following the filing of the Notice of Removal, the case was transferred to the U.S. District Court for the District of Maryland in Baltimore.

Discovery proceeded. Pursuant to Federal Rules of Civil Procedure 33 and 34, Petitioner filed Interrogatories and a "Request For Production of Documents" and specifically requested "all insurance policy documents and endorsements which covered said premises at any time since [Petitioner's] ownership dated May 4, 1973." Respondent, in effect, answered that there were no such documents, and Petitioner did not pursue the matter on the strength of Respondent's answer.

On October 4, 1993, Petitioner moved for Partial Summary Judgment, arguing that Respondent had, by virtue of the "Non-Waiver Agreement" executed before the denial of coverage, effectively waived the defense of "vacancy" it utilized in denying coverage.

On October 18, 1993, Respondent filed an Opposition To Petitioner's Motion and, at the same time, filed a Cross Motion For Summary Judgment, citing the "vacancy" exclusion as the basis for seeking judgment in the case. Petitioner filed an Opposition To Respondent's Motion, and also replied to Respondent's response to its Motion.

On November 15, 1993, Respondent submitted a further reply to Petitioner's response to Respondent's summary judgment motion.

On May 10, 1994, Petitioner sought leave of court to file an amended complaint adding Defendant Jennings Insurance Associates, Inc. as a party defendant. On May 25, 1994, Respondent filed an opposition to this Motion.

On October 13, 1994, acting without a hearing, the U.S. District Court (Legg, J.) by way of Memorandum and Order denied Petitioner's Motion for Partial Summary Judgment and granted Respondent's Motion for Summary Judgment. At the same time, the Court also granted Petitioner's Motion to amend its complaint, thereby adding Jennings as a party defendant.

On October 24, 1994, having obtained an extension of time to do so, Petitioner filed its First Amended Complaint, naming Jennings Insurance Associates Inc., a Maryland corporation, as a party defendant.

On November 23, 1994, the U.S. District Court determined that it no longer had jurisdiction because there was now a lack of diversity, and the First Amended Complaint was transferred to the state circuit court.

On December 16, 1994, Petitioner noted this Appeal with the U.S. Court of Appeals for the Fourth Circuit.

On February 14, 1995, Petitioner submitted its brief to the U.S. Court of Appeals for the Fourth Circuit in support of its appeal. In its brief, Petitioner raised three separate issues. They were whether Respondent had waived any defenses to coverage by virtue of its failure to expressly state "vacancy" as a basis for denial of coverage; whether Respondent should be "estopped" from relying on "vacancy" as a defense since "vacancy" was not listed in the "Non-Waiver Agreement"; and because of the unusual time delay in announcing "vacancy" as a basis for the denial of coverage; and whether the building was in fact "vacant" within the meaning of the exclusionary terms as set forth in the policy.

Respondent submitted a brief in opposition.

Petitioner's counsel then submitted a Reply Brief, which was later superseded by a Corrected Reply Brief, written and filed by counsel who subsequently argued the appeal. That in its Corrected Reply Brief, Petitioner reiterated its reliance on the issues of "waiver" and "estoppel" and further commented on these points as a basis for reversing the lower court's order granting summary judgment to Respondent. In essence, Petitioner thoroughly briefed all three issues in support of its Appeal.

In late March of 1995, after the initial briefs had been filed, Trustee Shofer, while searching for cover sheets at the state insurance commissioner's office discovered an "Explanatory Memorandum" for Respondent's proposed "SPECTRUM Policy Program Enhancement" which was directly applicable to Petitioner's existing policy. The proposed changes set forth in this "Memorandum" included a new definition of "vacancy". Further investigation revealed that these proposed changes were made and submitted during the time when the policy which is the subject of this suit had been issued to Petitioner, and yet these documents had not been produced pursuant to Petitioner's discovery requests. Petitioner contends that this new policy, with significant changes in language and definition, is highly material and relevant to the issue of the meaning of the term "vacant" or "vacancy" as defined in the policy which is the subject of this action.

On September 21, 1995, Petitioner filed a "Motion For Leave To File For Relief In U.S. District Court From Judgment Entered Herein Pursuant To Rule 60(b)". Respondent opposed this Motion.

On October 17, 1995, the U.S. Court of Appeals for the Fourth Circuit entered an Order denying this Motion. The Order was not published but is reproduced in the Appendix at p. 13a.

On October 17, 1995, the U.S. Court of Appeals for the Fourth Circuit issued its decision in this matter. The decision was published and is included in the Appendix at p. 3a.

On October 30, 1995, Petitioner filed a Petition For Rehearing and Suggestion for Rehearing in Banc.

On November 14, 1995, the U.S. Court of Appeals for the Fourth Circuit denied the Motion. The Order denying relief sought was not reported, but it is reproduced in the Appendix at p. 1a.

REASONS FOR GRANTING THE WRIT

1. The issues raised in this Petition deal with fundamental principles of due process in the federal judicial system.

2. The proper administration of justice requires that litigants receive adjudications on issues which have been properly raised and preserved on appeal.

3. In the instant case, three issues were properly before the U.S. Court of Appeals for the Fourth Circuit, and were extensively briefed by both sides.

4. Notwithstanding the fact that these three issues had been properly presented to the Court for review on appeal, the Appellate Court failed to render decisions on the issues of "waiver" and "estoppel" within the context of this appeal, and the Fourth Circuit's published opinion inaccurately states that there was "only one issue" on appeal.

5. Additionally, Petitioner discovered inadvertently after briefs had been submitted in this matter that Respondent had withheld material information pertaining to changes in policy language which had been within the scope of Petitioner's discovery requests, and non-disclosure of this highly relevant and significant evidence crippled the presentation of Petitioner's case.

That the Fourth Circuit failed to take action to enforce Petitioner's right to discovery materials which were highly relevant and material to a proper consideration of the policy language which was at the heart of Petitioner's lawsuit.

Petitioner's right to a fair trial and to Due Process as guaranteed by the United States Constitution were denied by failure of the Fourth Circuit to enforce the rules pertaining to

discovery and by its failure to decide issues properly before it on appeal.

A fair trial is a fundamental right which is guaranteed to every citizen by the United States Constitution. *Jenkins v. McKeithen*, 395 US 411. In order to ensure the fairness of trials, rules are adopted for the orderly administration of justice and to afford parties an equal opportunity to prepare and present their cases.

An important element in the preparation of a case is the right to obtain evidence and other materials and information which might prove useful and valuable in the development of a litigant's case. *Baltimore & O.R. Co. v. United States*, 298 US 349, 56 S. Ct. 797: 80 L.E.D. 1209 (1936). In order to facilitate this process, the courts have adopted rules which all parties are required to adhere to and which courts are required to enforce.

Here, Petitioner, through the discovery process, requested that Respondent provide copies of "any and all insurance policy documents and endorsements which covered said premises at any time since Plaintiff's ownership dated May 4, 1973." There were in fact such documents, despite Respondent's reply that no such documents existed.

In fact, Respondent had sought to change the very policy language which was the issue in this lawsuit, prior to the time of the fire in this case.

By denying this material evidence to Petitioner, Respondent "controlled" the way Petitioner prepared its case. By failing to enforce the discovery rules, the Fourth Circuit deprived Petitioner of Due Process because all potential evidence which was material and relevant to a proper determination of the case was not before the Court, or available for use by Petitioner. Fair play is the essence of

Due Process. *Galvan v. Press*, 347 US 522, 74 S. Ct. 737, 98 L. Ed. 911, Reh. Den. 348 US 852, 75 S. Ct. 17, 99 L. Ed. 671 (1954).

Three issues were identified by Petitioner as central to a fair and just decision in the case. Those issues were the definition of the words "vacant" and "vacancy" as defined and used in the policy, and the concepts of "waiver" and "estoppel" as those principles might apply to the litigant's post occurrence actions. All three of these issues were briefed by both parties. Only one issue -- "vacancy" -- was decided by the Fourth Circuit.

Indeed, the Fourth Circuit stated in its published opinion that only "one issue" was before the Court in connection with this appeal. Such a statement is erroneous. Three issues, all equally important to Petitioner's case, were preserved on appeal and thoroughly briefed by both parties.

By refusing to acknowledge the existence of the issues of "waiver" and "estoppel," the Court has in essence ruled that such issues do not exist and that the conduct giving rise to these concepts never occurred. Petitioner has in essence been prevented from having its case fairly and justly decided. Unless the courts do their job thoroughly and completely, injustices will follow as occurred in the instant case, and when justice is incomplete, there is a violation of Due Process as provided in the Fifth Amendment of the Constitution of the United States.

CONCLUSION

The Petitioner requests review before this Court in order to establish the duty obligation of the Appellate Courts to render decisions on all material and relevant issues which are properly before them, and to enforce the discovery rules which are essential to Due Process and the guarantee of a fair trial.

These issues are essential to the fair administration of justice and to ensure the protection of the constitutional rights of all citizens.

The Petition for certiorari should be granted.

Respectfully submitted,

Douglas R. Taylor
Counsel for Petitioner

February 12, 1996

APPENDIX

FILED: November 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1015
CA-93-1088-L

CATALINA ENTERPRISES, INCORPORATED PENSION TRUST,

Plaintiff - Appellant

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant - Appellee,

and

JENNINGS INSURANCE ASSOCIATES, INCORPORATED,

Defendant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CATALINA ENTERPRISES, INCORPORATED PENSION TRUST,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY,

No. 95-1015

Defendant-Appellee,

and

JENNINGS INSURANCE ASSOCIATES, INCORPORATED,

Defendant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Benson E. Legg, District Judge.
(CA-93-1088-L)

Argued: May 3, 1995

Decided: October 17, 1995

Before ERVIN, Chief Judge, and MURNAGHAN and NIEMEYER, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Ervin and Judge Murnaghan joined.

COUNSEL

ARGUED: Max Higgins Lauten, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for Appellant. Craig David Roswell, NILES, BARTON & WILMER, Baltimore, Maryland, for Appellee.

ON BRIEF: Thomas H. Bornhorst, Baltimore, Maryland, for Appellant. V. Timothy Bambrick, NILES, BARTON & WILMER, Baltimore, Maryland, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

Late on May 9 or early on May 10, 1992, a fire began in a warehouse on Quad Avenue in Baltimore, Maryland, owned by Catalina Enterprises, Inc. Pension Trust. The fire caused approximately $541,000 in damage. When Catalina presented its proof of loss to its insurer, Hartford Insurance Company, Hartford Insurance denied coverage because, at the time of the fire, the warehouse had been "vacant" for almost five months, and the applicable insurance policy excluded coverage for vacant buildings. Catalina filed a breach of contract suit against Hartford Insurance, and the district court granted Hartford Insurance's motion for summary judgment. On appeal, Catalina contends that the district court misconstrued the vacancy exclusion. We disagree and therefore affirm.

I

At the time of the fire, Catalina's warehouse was not occupied by any tenant, the last tenant having left in December 1991, about five months earlier. That tenant had stored unprocessed pepper in the warehouse for the McCormick spice company. After the last tenant left, the heat for the warehouse and all but two circuit breakers were turned off. The two circuit breakers left on were for lights in the office area and for the alarm system. Later, but before the fire, Catalina also deactivated the alarm system.

When the fire began, the only contents in the Quad Avenue warehouse were one piece of scaffolding and one hand truck. The hand truck was a hydraulic, hand-operated pallet truck that had been left on the premises by the previous tenant. The scaffolding, which belonged to Catalina, was a rolling scaffolding, approximately 6 to 8 feet wide with a height of 18 to 20 feet. The warehouse also included a small office area, which at the time of the fire contained only a small work table. The work table apparently belonged to Catalina since the last tenant had removed all of its furniture from the office area when it left. The office contained no business records or business supplies.

The Hartford Insurance policy in effect when the warehouse caught fire contained an exclusion for losses occurring while the building was vacant if the building had been continuously vacant during the previous 60 days. The exclusion reads:

> Vacancy or Unoccupancy. This Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant beyond a period of 60 consecutive days. "Vacant" or "vacancy" means containing no contents pertaining to operations or activities customary to occupancy of the building,

> but a building in process of construction shall not be deemed vacant.

Relying on this exclusion, Hartford Insurance denied liability for the fire loss.

When Catalina filed suit for breach of the insurance contract, Hartford Insurance filed a motion for summary judgment. Granting themotion, the district court concluded that "[b]y any reasonable interpretation of the policy language, the warehouse had been `vacant' for 60 days prior to the fire." In reaching its conclusion that Catalina's building had been "vacant" within the meaning of the policy, the district court referred to undisputed record evidence that (1) no tenant had occupied the building from December 17, 1991, until the fire; (2) the only non-fixtures that remained in the warehouse part of the building after the last tenant left were a piece of scaffolding owned by Catalina and a hand truck abandoned by the previous tenant; (3) with the exception of one small work table owned by Catalina, the office area of the building contained no furniture and no business records or supplies; (4) the building's alarm system was deactivated and its heat and electricity (except for the lights in the office area) turned off; and (5) the building was not in the process of construction and only two minor repairs had been completed on it while it was vacant.

On appeal, Catalina does not contest any of the facts relied on by the district court. Rather, it argues that summary judgment for Hartford Insurance was improper as a matter of law.

II

The sole issue presented for our consideration is whether the clause in Hartford Insurance's fire insurance policy excluding coverage for buildings that are vacant for more than 60 days, where "vacant" means "containing no contents pertaining to

operations or activities customary to occupancy of the building," denies Catalina coverage.

The parties agree that because this is a diversity case, Maryland law governs the policy's construction.

Under Maryland law, insurance policies are interpreted in the same manner as contracts generally; there is no rule in Maryland that insurance policies are to be construed most strongly against the insurer. See Collier v. MD-Individual Practice Ass'n, 327 Md. 1, 5 (1992). The "primary purpose" in construing insurance contracts, like all contracts, is to ascertain and give effect to the intentions of the parties at the time of contracting. See Schuler v. Erie Ins. Exch., 81 Md. App. 499, 505, cert. denied, 319 Md. 304 (1990); Aragona v. St. Paul Fire and Marine Ins. Co., 281 Md. 371, 375 (1977). To ascertain the parties' intent, the court must "construe the instrument as a whole." Collier, 327 Md. at 5. In addition to the contractual language, the court may look to the character of the contract, its object and puroses, and the factual circumstances of the parties at the time of execution. Id. Clear and unambiguous language, however, must be enforced as written and may not yield to what the parties later say they meant. Board of Trustees of State Colleges v. Sherman, 280 Md. 373, 380 (1977) ("where a contract is plain and unambiguous, there is no room for construction"). Unless there is an indication that the parties intended to use words in a special, technical sense, the words in a policy should be accorded their "usual, ordinary, and accepted meaning." Bausch & Lomb, Inc. v. Utica Mutual Ins. Co., 330 Md. 758, 778 (1993). "A word's ordinary signification is tested by what meaning a reasonably prudent layperson would attach to the term." Id.

Catalina's argument focuses on the words "no contents" in the policy's definition of "vacant." Catalina urges a strict, literal reading of the words "no contents" so that the presence in the

warehouse of a single object or item, no matter how small or insignificant, would render a building not vacant. While the object or item must "pertain[ ]to operations or activities customary to occupancy," Catalina contends that this language only means that the object or item must be one that is customarily found on the property when it is occupied. Applying this interpretation to the instant case, the presence of any one of the three items found on Catalina's property at the time of the fire--the scaffold, the hand truck, or the table--would be enough to avoid the vacancy exclusion because each of these items is customarily found on the premises when it is occupied.

Catalina concedes that its interpretation places somewhat of a strain on what people ordinarily think of as a "vacant" building. But Catalina argues that Hartford Insurance chose to use the words "no contents" in its definition of "vacant" and that the author of the insurance contract is bound by the language it selects, no matter how disadvantageous that language may be. See C&H Plumbing & Heating, Inc. v. Employers Mut. Cas. Co., 264 Md. 510, 512 (1972) (court may not relieve party from term just because it is disadvantageous to that party). Indeed, Hartford Insurance could just as well not have defined the term "vacant" in its policy, in which case we would be bound to implement the ordinary meaning of the term. But given the facts in this case, Catalina argues, the court is bound by the particular wording chosen by Hartford Insurance. See Valliere v. Allstate Ins. Co., 324 Md. 139, 142 (1991) (when insurance policy defines term in manner different from ordinary understanding of that term, policy definition must control).

Although Catalina correctly recites various interpretive principles, it fails to recognize others with which they must be harmonized to reach a rational result. Pressing the phrase "no contents" to the extreme urged by Catalina would for all practical purposes eliminate the coverage exclusion from the

policy. Virtually no building could be considered vacant if the notion of vacancy is defeated by the existence of a paper clip, a stray pencil, or a light bulb. Read in its entirety, the language of the exclusion does not convey this intent. See Teamsters Local 639 Employers Health Trust v. Reliable Delivery Serv., Inc., 42 Md. App. 485, 488-89 (Md. App. 1979) (terms of insurance contract must be read in context of entire contract, not according to any single clause, phrase, or section). It is axiomatic under Maryland law that a court should avoid reading a contract in a way that produces an absurd result, especially when a reasonable interpretation is available. See Ensor v. Wehland, 243 Md. 485, 492 (1966) (citing Gibbs v. Meredith, 187 Md. 566, 570 (1947)); see also DeJarnette v. Federal Kemper Ins. Co., 299 Md. 708, 721 (1984) ("A strained or unreasonable construction of the policy language should not be indulged in."); Canaras v. Lift Truck Servs., Inc., 272 Md. 337, 357 (1974) (when provision is susceptible to more than one meaning, a fair and reasonable construction of contract should always be favored over one that leads to harsh and unreasonable result).

Reading the exclusion in this case naturally and in its entirety, we find that the phrase "no contents" is qualified by the clause that follows it--"pertaining to operations or activities customary to occupancy of the building"--so that the vacancy exclusion does not mean that the building must be devoid of any contents, however insignificant. Rather, the contents must be of a type indicative of operations or activities that ordinarily occur when the building is occupied. In other words, the exclusion means that a building is vacant when it contains nothing in it to indicate that the building is occupied or being used for the purpose for which it normally is used when occupied.

The reason for vacancy exclusions in fire insurance policies is obvious: empty buildings without occupants or activities pose

increased fire risks. When a building is not in use, it is more likely that potential fire hazards will remain undiscovered or unremedied. Chances are also greater that a fire in a vacant building will burn for a longer period and cause greater damage before being detected. When an empty building is destroyed by fire, moreover, the question is raised more frequently whether the building was intentionally destroyed to avoid further economic loss. For all these reasons, insurance companies consider insuring vacant buildings more risky, and accordingly, charge greater premiums to cover such risk. Unless a policy intends to include the risk of insuring a vacant building, we must, when interpreting an exclusion for vacant buildings, remember the broader intention of the parties. See Parker v. State Farm Mut. Auto. Ins. Co., 263 Md. 206, 216 (1971) (insurance carrier that has contracted to underwrite specific coverage should not be expected to assume liability for risk specifically excluded by policy).

In this case the Quad Avenue warehouse was customarily used for industrial storage. Accordingly, it can only be found not vacant if its contents indicate that it is currently being used by an industrial company for storage. No reasonable person would believe that anyone was currently using the Quad Avenue warehouse for storage based on the presence of one non-motorized hand truck and one piece of scaffolding when the building was otherwise completely empty. This is especially true in light of all the other facts the district court considered.

Several courts in other jurisdictions have construed insurance policies with definitions of "vacant" identical to that used by Hartford Insurance. Most of the cases join us in rejecting Catalina's extreme interpretation by focusing on the phrase "pertaining to operations or activities customary to occupancy of the building" that qualifies the words "no contents." In Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570 (7th Cir. 1987) (applying Indiana law), for

instance, the court held that a water pumping station was "vacant" even though some miscellaneous water pumping equipment had been left behind by the previous tenant after it had ceased operations. Id. at 572 n.2. Because the small amount of abandoned equipment obviously was not on the property as part of a current water pumping operation, the court concluded that there were no contents in the building pertaining to operations or activities. See also Myers v. Merrimack Mut. Fire Ins. Co., 788 F.2d 468 (7th Cir. 1986) (applying Illinois law) (finding apartment building "vacant" despite presence of certain insignificant items, including stoves and refrigerators); but cf. Shaffner v. Farmers Mut. Fire Ins. Co. of St. Clair County, 859 S.W.2d 902 (Mo. Ct. App. 1993) (holding that dwelling was not vacant because of presence of stove, antique incubator, and chair).

We agree with the district court that "[b]y any reasonable interpretation of the policy language, [Catalina's] warehouse had been `vacant' for 60 days prior to the fire," and that "[n]o reasonable jury could find otherwise." The judgment of the district court is accordingly affirmed.

AFFIRMED

FILED: October 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 95-1015
(CA-93-1088-L)

CATALINA ENTERPRISES, INCORPORATED PENSION TRUST,

Plaintiff - Appellant

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant - Appellee,

and

JENNINGS INSURANCE ASSOCIATES, INCORPORATED,

Defendant.

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Bert M. Montague

Clerk

FILED: October 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1015
(CA-93-1088-L)

CATALINA ENTERPRISES, INCORPORATED PENSION TRUST,

Plaintiff - Appellant

versus

HARTFORD FIRE INSURANCE COMPANY,

Defendant - Appellee,

and

JENNINGS INSURANCE ASSOCIATES, INCORPORATED,

Defendant.

ORDER

Appellant has filed a motion for leave to file for relief under Rule 60(b) of the Federal Rules of Civil Procedure in the district court during the pendency of the appeal. Appellee

has filed a response in opposition to the motion and Appellant has filed a reply in support of the motion.

The Court denies Appellant's motion.

Entered at the direction of Judge Niemeyer with the concurrence of Chief Judge Ervin and Judge Murnaghan.

For the Court

/s/ Bert M. Montague

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CATALINA ENTERPRISES, INC. PENSION TRUST	:	
v.	:	CIVIL NO. L-93-1088
THE HARTFORD INSURANCE COMPANY	:	

ORDER

For the reasons stated in a Memorandum filed this date,

(a) Plaintiff's motion for partial summary judgment is hereby DENIED;

(b) Defendant's motion for summary judgment is hereby GRANTED;

(c) Plaintiff's motion for leave to amend complaint and for joinder of a necessary party is hereby GRANTED.

Plaintiff shall file by October 14, 1994 a revised amended complaint in accordance with this Court's Memorandum. A Scheduling Order will be issued by the Court.

IT IS SO ORDERED this 11th day of October, 1994.

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Benson Everett Legg
United States District Judge